U.S. Department of Justice

Immigration and Naturalization Service

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PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 02 035 53983 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an other worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a thoroughbred racing and training stable. It seeks to employ the beneficiary permanently in the United States as a stable attendant. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 4, 2001. The beneficiary's salary as stated on the labor certification is $9.49 per hour or $19,739.20 per year.

A third party has intervened in the appeal, but has submitted no Notice of Appearance as Attorney or Representative (G-28). The petitioner has not executed a G-28 and is, therefore, the only entity entitled to notice of this decision. 8 CFR § 292.5(a).

All representations will be considered but notice given only to the petitioner.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. On December 28, 2001, the director requested additional evidence (Form I-797) to establish the petitioner's ability to pay the proffered wage as of the priority date, continuing until the beneficiary obtains lawful permanent residence. The Form I-797 specified the petitioner's complete 2001 federal income tax return, a current audited financial statement, and evidence of the prior experience listed on Form ETA 750.

In response, the petitioner submitted its unsigned 2001 Form 1120S U.S. Income Tax Return for an S Corporation with schedules and tables. The unsigned federal tax return for 2001 reflected an ordinary (loss) of ($25,414), less than the proffered wage. Schedule L, the balance sheet, showed a deficit of net current assets ($72,617), defined as the currents assets of $91,062 less the current liabilities of $163,679 evidenced insufficient assets to pay the proffered wage. The director determined that the petitioner did not have the ability to pay the proffered wage and denied the petition. On appeal, the petitioner submits a signed Form 1120S.

The petitioner's brief indicates that the beneficiary is already employed and states in full:

> Appeal is being sought in this decision because the Service did not take into consideration that wages in excess of $212,000 dollars (sic) and $35,000 dollars in officer compensation as well as over $10,000 dollars in depreciation are included in the corporate taxes submitted. Although the corporation itself showed a loss of $25,000 dollars, this was after the wages of it's (sic) employee's (sic) (including the beneficiary) were paid. Re-examination of the documents is requested. A signed cover 1120A has been included.

The petitioner's argument is not persuasive. The Form ETA 750 reflects the petitioner's employment of the beneficiary from March 2000, but amendments to the ETA 750 acknowledge a rate a little over a half of the proffered wage set forth in Block 12. The petitioner offers no evidence, such as Form W-2 or 1099-Misc, that, at the priority date, the wage it paid to the beneficiary equaled or exceeded the proffered wage.

Matter of Ho, 19 I&N Dec. 582 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both Service and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. The petitioner points to no calculation, with or without depreciation, to support the ability to pay the proffered wage at the priority date of the petition.

After a careful review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.